A. A. McGREGOR

IBLA 74-294 Decided November 25, 1974

Appeal from decision of the Utah State Office, Bureau of Land Management, requiring that special stipulations be executed as a condition precedent to the issuance of oil and gas leases U 25441, U 25444, U 25445, U 25448, U 25449, U 25458, and U 25476, and rejecting portions of the lands in U 25476.

Vacated and remanded.

1. Environmental Quality: Generally-- Oil and Gas Leases: Generally--Oil and Gas Leases: Stipulations--Secretary of the Interior

Although the Bureau of Land Management may require such special stipulations as are necessary for the protection of the lands embraced in any lease, proposed special lease stipulations must be supported by valid reasons which will be weighed by this Department with due regard for the public interest. It is the Bureau's responsibility to impose stipulations which are necessary, appropriate and reasonably related to oil and gas activities, but stipulations which would forbid the lessee to occupy the surface must be justified by adequate reasons in order to be sustained on appeal.

2. Oil and Gas Leases: Generally--Oil and Gas Leases: Lands Subject to--Right-of-Way Leases

Lands under reservoir rights-of-way can be leased only under the authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1970). However, the language of the 1930 Act is construed

> to mean that it applies only to land actually within the limits of the right-of-way and that the lands in legal subdivisions, exclusive of the reservoir right-of-way, may be leased under the Mineral Leasing Act of 1920, provided there are no compelling reasons for refusing to lease them.

APPEARANCES: C. M. Peterson, Esq., Poulson, Odell & Peterson, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

A. A. McGregor has appealed from a decision of the Utah State Office (BLM), dated March 27, 1974, which required him to accept special stipulations as a condition precedent to the issuance of seven noncompetitive oil and gas leases under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 et seq. (1970), and which also rejected one of the lease offers as to portions of the lands for the stated reason that such lands are under two reservoir rights-of-way and are not available for noncompetitive public domain oil and gas leasing.

The stipulations required by BLM are all "no surface occupancy" stipulations, which read as follows:

> No occupancy of the surface of * * * [land description] is authorized by this lease. The lessee, however, is authorized to employ directional drilling to the oil and gas provided that such drilling will not disturb the surface.

The record is devoid of any reasons or justification for requiring these stipulations. The only indication that they are required consists of notations on the Oil and Gas Status Plats in the case files "No Surface Occupancy: * * * [land description]" within each of the townships involved. The notations contain no authority or basis therefor.

A graphic picture of each offer has been made by delineating on a plat the lands contained in the offer as well as the portion or portions of the offer described in the proposed stipulation. The following analyses have been made from these for each offer.

U 25441. The stipulation applies to a tract of 80 acres of a total 2,528.21 acres embraced in the offer.

U 25444. The offer describes six separate isolated tracts having a total of 2,123.12 acres. The stipulation covers two entire tracts, one of which contains 878.37 acres and the other

40 acres. Thus, the lessee would have no base from which to directional drill these two tracts.

U 25445. The stipulation affects a block of 1,113.41 acres of a total area of 2,393.41 acres embraced in the offer. Although the lands described in the offer are contiguous, the land pattern is such that there is apparently no way to develop any portion of the affected block from the remaining block except for a relatively small portion of its eastern fringe.

U 25448. The stipulation covers two blocks separated from each other, both running lengthwise north-south, and containing a total of 439.37 acres of a total 1,036.97 acres described in the offer. Although the remaining block is contiguous to the south ends of both blocks, it appears exceedingly doubtful that they could be developed by directional drilling except for their southerly fringe areas.

U 25449. This offer embraces three separate isolated tracts with a total of 2,066.32 acres. The largest tract of 946.32 acres, which is unaffected by the stipulation, is so distantly separated from the other tracts that none of the latter could provide a base for directional drilling. In the remaining two tracts, the stipulation covers one block of 480 acres, one block of 160 acres, one of 80 acres, and two of 40 acres each, or a total of 800 acres. The land pattern is such that it appears impossible to develop any portion of the 480-acre block except for a very small portion of its northeasterly fringe, and the remaining blocks are so interspersed within the elongated tracts that it appears it would be very difficult, if not entirely impossible, to develop oil and gas deposits from them.

U 25458. The offer embraces three separate isolated tracts having a total of 2,458 acres. The stipulation covers two entire tracts, one of which contains 240 acres and the other 80 acres. The lessee would have no base from which to drill these two tracts.

U 25476. The stipulation in this offer covers a small isolated tract of 27.02 acres out of a total of 2,293.83 acres embraced in the offer. The BLM decision also rejected two tracts in this offer because they are embraced in reservoir rights-of-way, which we will discuss later in this opinion. However, we note at this point that one of the rejected tracts is the same 27.02-acre tract affected by the stipulation.

In his appeal, McGregor presents reasons and arguments against the "no surface occupancy" stipulations. He contends that proposed special lease stipulations must be supported by valid reasons, citing George A. Breene, 13 IBLA 53 (1974), as authority. In this connection, his attorney avers that he examined the land records of the

Utah State Office in an attempt to determine the specific reasons for the "no surface occupancy" category as applicable to the specific lands included in the offers but could find no basis for requiring the stipulations. The attorney stated that while the State Office personnel were able to locate a Xerox copy of a communication from the Salt Lake District Office recommending areas for classification of lands for "no surface occupancy" or "restricted leasing area," it was largely illegible and contained no reason for such classifications. He was also furnished a copy of an "Environmental Analysis Report, No Surface Occupancy, Oil and Gas Leases," which discusses three recreational areas in general terms without designating any specific lands for classification.

Appellant's attorney further alleges that personnel at the Salt Lake District Office were unable to locate their recommendations to the State Office designating specific reasons for including areas within the various oil and gas leasing categories. They did, however, discuss the reasons on an individual lease application basis, and the following probable reasons for requiring the stipulation in each case were given by the personnel of the District Office:

> U 25441. The District Office was unable to furnish a specific reason for the stipulation and stated the lands should probably be subject to surface disturbance stipulations only.
>
> U 25444. The lands have a range improvement project involving reseeding and portions of the lands are crossed by a fishing stream.
>
> U 25445. Lands are within a range improvement project involving reseeding and a fishing stream.
>
> U 25448. Land involved in a range improvement project involving reseeding and near a fishing stream.
>
> U 25449. Land within a range improvement project involving reseeding, fishing stream in the area, and lands within the drainage area for the Little Creek Reservoir.
>
> U 25458. Lands are located east of Bear Lake.
>
> U 25476. Lands are located adjacent to Woodruff Reservoir.

Appellant argues that oil and gas operations do not require a great deal of surface area which would disturb the range improvement projects, and that the lessee is usually required to reseed

any disturbed areas following his operations; that, even without special lease stipulations, a lessee is required to conduct his operations so as not to pollute streams or reservoirs; that he would be willing to accept the standard Surface Disturbance Stipulations, Oil and Gas Lease, contained on BLM Form 3109-5 (May 1973). He submits that, if his operations were located in relation to a fishing stream at a point which required special protection for the stream, he could be required to comply with such special requirements which may be imposed by the Oil and Gas Supervisor prior to approval of his proposed operations, as provided for by Form 3109-5.

Appellant also contends that the stipulations are unreasonable and would render the leases nugatory as to large areas, citing A. Helander, 15 IBLA 107 (1974), in support thereof. He argues that some of the "no surface occupancy" areas are extremely large so as to make drilling to certain of the lands impossible; and the directional drilling provision does not, therefore, offer a viable alternative which would assure to him the basic rights granted by the lease. He further states that a lessee may desire to acquire access to the lands for purposes of conducting surface geologic studies, gravity or seismic or other geophysical exploration, core drilling or minimal use for access roads to other portions of the leased lands; and that many of these types of activities do not have a significant impact on the surface values.

[1] The BLM may require such special stipulations as are necessary for the protection of the lands embraced in any lease. 43 CFR 3109.2-1. However, proposed special lease stipulations must be supported by valid reasons which will be weighed by this Department with due regard for the public interest. George A. Breene, supra. It is the BLM's responsibility to impose stipulations which are necessary, appropriate and reasonably related to oil and gas activities. Bill J. Maddox, 17 IBLA 234 (1974). However, "* * * stipulations which would forbid the lessee to occupy the surface of his leasehold, or a large portion thereof, must be justified by adequate reasons in order to be sustained on appeal. [Footnote omitted] Such reasons should demonstrate that the other resources or amenities of the land to be protected are of sufficient value to warrant the imposition of such a severe restraint, and that less stringent alternatives would not adequately accomplish the intended purpose by containing the adverse effects of oil and gas operations within acceptable limits." Id. at 237. The BLM has not furnished any reasons or justification for requiring the restrictive "no surface occupancy" stipulations in these cases. The only indications before us now are the probable reasons alleged by appellant's attorney to have been developed through his conversations with personnel of the Salt Lake District Office.

Although the BLM may require acceptance of special stipulations as a condition precedent to the issuance of an oil and gas lease where such stipulations are designed to protect environmental, recreational, soil and surface resources, and other land use values, the stipulations must be such that they do not unreasonably interfere with the lessee's rights of enjoyment. A. Helander, supra, and cases cited. It is BLM's responsibility to determine whether special stipulations are necessary and to impose stipulations which are appropriate and reasonably related to oil and gas activities. Id. at 109; John Oakason, 6 IBLA 275, 277 (1972). The case record contains no basis for the imposition of the proposed stipulations. Furthermore, it appears that the Surface Disturbance stipulations on BLM Form 3109-5 (May 1973), which appellant has indicated a willingness to accept, would provide substantial protection. 1/ Accordingly, the cases will be remanded to the Utah State Office for further consideration and a determination as to the need for the "no surface occupancy" stipulations.

1/ Form 3109-5 reads:

"1. Notwithstanding any provision of this lease to the contrary, any drilling, construction, or other operation on the leased lands that will disturb the surface thereof or otherwise affect the environment, hereinafter called "surface disturbing operation," conducted by lessee shall be subject, as set forth in this stipulation, to prior approval of such operation by the Area Oil and Gas Supervisor in consultation with appropriate surface management agency and to such reasonable conditions, not inconsistent with the purposes for which this lease is issued, as the Supervisor may require to protect the surface of the leased leads and the environment.

"2. Prior to entry upon the land or the disturbance of the surface thereof for drilling or other purposes, lessee shall submit for approval two (2) copies of a map and explanation of the nature of the anticipated activity and surface disturbance to the Area Oil and Gas Supervisor and will also furnish the appropriate surface management agency named above, with a copy of such map and explanation.

"An environmental analysis will be made by the Geological Survey in consultation with the appropriate surface management agency for the purpose of assuring proper protection of the surface, the natural resources, the environment, existing improvements, and for assuring timely reclamation of disturbed lands.

"3. Upon completion of said environmental analysis, the Area Oil and Gas Supervisor shall notify lessee of the condition, if any, to which the proposed surface disturbing operations will be subject.

"Said conditions may relate to any of the following:

(a) Location of drilling or other exploratory or developmental operations or the manner in which they are to be conducted;

There is another factor involved which, in itself, would compel a remand of these cases by this Board. The files contain copies of the following Memorandum to the File, dated April 26, 1974, by a Land Law Examiner of the Utah State Office:

> Since the decision of March 27 was issued the "no surface occupancy" areas in the townships were the subject offers are located have been revised as follows:
>
> U-25441: The "no surface occupancy" area has been eliminated. The stipulation is no longer required. 2/
>
> U-25444: Delete Sec. 18, and add NE 1/4 NE 1/4, S 1/2 NE 1/4, SE 1/4 Sec. 15.
>
> U-25445: Delete S 1/2 NE 1/4, SE 1/4 NW 1/4, SW 1/4, NE 1/4 SE 1/4, S 1/2 SE 1/4 Sec. 20, lot 3, SW 1/4 NE 1/4, S 1/2 NW 1/4, S 1/2 Sec. 21.
>
> U-25448: Delete lot 4, S 1/2 SE 1/4 Sec. 30.
>
> U-25449: Delete E 1/2 SE 1/4 Sec. 21, All in Sec. 22, and add N 1/2 NE 1/4 Sec. 23.
>
> U-25458: Add Lot 1 Sec. 17. The Surface of this lot was patented under R/PP with a reservation of minerals to the U. S. 3/

(Fn. 1 Cont.)

(b) Types of vehicles that may be used and areas in which they may be used, and

(c) Manner or location in which improvements such as roads, buildings, pipelines, or other improvements are to be constructed."

2/ If this is true, lease U 25441 could issue without the stipulation.

3/ While special surface protection stipulations should be required for land patented under the Recreation and Public Purposes Act of June 14, 1926, as amended, 43 U.S.C. § 869 et seq. (1970), we do not agree that the stipulations should necessarily prevent any surface occupancy unless oil and gas activities would be incompatible with the surface use of the land for which the patent was granted.

U-25476: Add lots 3, 4, E 1/2 SW 1/4, SE 1/4 Sec. 18, lots 5-8, 11-15 excl. Res. R/w U-01817 [Sec. 19], lots 5, 8, 9 Sec. 30. Lots 14 and 15 Sec. 19 and lots 5, 8, 9 Sec. 30, were patented SRHE's. 4/

While these revisions would eliminate some of the areas in the various offers from the burden of the proposed stipulations, at the same time, it adds other areas to be made subject to the stipulations. Moreover, the memorandum indicates indecisiveness on the part of the BLM and that its program for classifying lands not subject to surface occupancy in the broad geographical area is still in a fluid state.

As we mentioned heretofore, the State Office decision also rejected application U 25476 as to lots 5, 6, and 12, Sec. 19, and lots 7 and 8, sec. 31, T. 9 N., R. 6 E., S.L.M., because they are under two reservoir rights-of-way and are not available for noncompetitive oil and gas leasing under the Mineral Leasing Act of 1920. Appellant agrees that those lands under reservoir rights-of-way are not available for leasing under the 1920 Act but submits that the lands in those lots not included in the rights-of-way are available for leasing under that act, and the lease should issue to him covering such lands subject to special stipulations.

[2] We agree with appellant. Lands under reservoir rights-of-way can be leased only under the authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1970); Jay P. Nielson, A-29743 (1963); United Technical Industries, Inc., A-29406 (1963); Phillips Petroleum Co., 61 I.D. 93, 96 (1953). This act authorizes the Secretary of the Interior "to lease deposits of oil or gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States." [Emphasis added]. We construe this language to mean that the 1930 Act applies only to the land actually within the limits of the reservoir right-of-way and that the lands in the subdivisions exclusive of the reservoir may be leased under the Mineral Leasing Act of 1920, provided there are no compelling reasons for refusing to lease them.

4/ Special stipulations are not necessarily required for the protection of lands patented under the Stock-Raising Homestead Act of December 26, 1916, as amended, 43 U.S.C. § 291 et seq. (1970). Sec. 9 of the Act, 43 U.S.C. § 299, reserves to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine and remove the same. Until a general lease bond is filed, a noncompetitive lessee will be required prior to entry on the leased lands to furnish and maintain a bond in the penal sum of not less than $1,000 for the protection of the owners of the surface rights. 43 CFR 3104.1-1(c).

A map delineating the area of a reservoir must be filed and approved by the Secretary of the Interior, and upon approval by the Secretary the same is noted upon the plats in the land office and thereafter such lands shall be disposed of subject to such right-of-way. See R. S. McKnight, 72 I.D. 153, 154 (1965). Cf. George W. Zarak, 4 IBLA 82 (1971), aff'd. sub nom. Rice v. United States, 479 F.2d 58 (8th Cir. 1973), as to the limits of a railroad right-of-way crossing legal subdivisions, and Charles A. Son, 53 I.D. 270 (1931), holding that an oil and gas lessee of a tract of public land crossed by a railroad or other right-of-way granted prior to the execution of the lease acquires no rights to the mineral deposits in or under the lands embraced in the right-of-way, which are subject to leasing under the 1930 Act, supra.

We note that a reservoir is delineated on the plat in the case file as covering portions of contiguous lots 5, 6, and 12, sec. 19. Therefore, there appears to be no reason why these lots, exclusive of the reservoir right-of-way, should not be leased with suitable stipulations. The Surface Disturbance Stipulations on Form 3109-5 would probably provide adequate protection. The plat, however, does not show the reservoir right-of-way affecting lots 7 and 8, sec. 31, which comprise a small narrow tract completely isolated from any other lands in the application. Therefore, it is possible that this tract may be completely within the boundaries of the reservoir and not subject to lease or the remaining area not within the reservoir may be so small that leasing would be impracticable. Also, we noted above the apparent contradiction in the State Office decision in rejecting the application as to this tract, and, at the same time, requiring the applicant to execute a "no surface occupancy" stipulation for it.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is vacated and the cases are remanded to the Utah State Office for further consideration and appropriate action consistent with the views expressed herein.

Anne Poindexter Lewis
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Martin Ritvo
Administrative Judge